IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INCOME TAX MATTER

Date of Decision : September 17, 2007

ITA NO 1458 of 2006

COMMISSIONER OF INCOME TAX .....PETITIONER
Through : Ms. Sonia Mathur, Advocate

versus

M/S. MOSER BAER INDIA LIMITED ....RESPONDENT
Through: Mr. Ajay Vohra with Ms. Kavita Jha, Advocate

ITA NO 1690/2006

COMMISSIONER OF INCOME TAX .....PETITIONER
Through : Ms. Sonia Mathur, Advocate

versus

M/S. MOSER BAER INDIA LIMITED ....RESPONDENT
Through: Mr. Ajay Vohra with Ms. Kavita Jha, Advocate

CORAM:
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE DR. JUSTICE S. MURALIDHAR

1. These appeals under Section 260(A) of the Income Tax Act, 1961 ('Act') are directed against the common order dated 1st March, 2006 passed by the Income Tax Appellate Tribunal ('Tribunal') Delhi Bench "D", New Delhi in ITA No. 1568/Del/2001 and CO No. 112/Del/2005 for the Assessment Year 1996-97 concerning the penalty proceedings under Section 271(1)(c) of the Act.

2. The Assessee filed a return on 30th November, 1996 declaring a loss of Rs.2,72,12,620/-. In the course of assessment proceedings it was noticed that although the Assessee had excluded the income of floppy Unit II and

III from its total income by claiming exemption under Sections 10A and 10B of the Act, the depreciation in respect of these units had been deducted from its income. An explanation was sought from the Assessee in this regard. By its letter dated 8th January, 1999 the Assessee submitted that the claim for depreciation was a clerical mistake. The Assessee filed a revised computation. The Assessee filed a further application on 8th February, 1999 withdrawing its claim of deduction under Section 10B of the Act in respect of floppy unit II for the assessment year in question that is 1996-97 since that unit had incurred a loss. Thereafter, the Assessing Officer computed the total income of the Assessee as Nil and observed that penalty proceedings under Section 271(1)(c) of the Act have been initiated separately.

3. The relevant portion of the assessment order dated 8th March, 1999 reads as under:

"Net Profit before depreciation
Less: Dep. As per Income Tax Act

Total Dep. As I.T.Act	52,411,362.12	
Less: Dep. of Fl II and Fl.III	48,183,139.00	42,28,233.00
Adjusted against the b/f losses/ dep. (subject to the rectification, after the B/f/dep/losses of the earlier years are determined)		47,01,433.11
Total Income		Nil

Assessed at nil Income. Issue necessary forms. Penalty proceedings u/s 271(1)(c) have been initiated separately."

3. Following this a penalty notice was issued to the Assessee on 8th March, 1999. The Assessee had requested the penalty proceedings to be kept in abeyance since it had filed a quantum appeal. After the quantum appeal of the Assessee was dismissed by the Commissioner of Income Tax (Appeals) ['CIT(A)'] on 24th January, 2000, the Assessing Officer on 21st July, 2000 issued an order under Section 271(1)(c) of the Act imposing a penalty of Rs.4,43,28,488/- on the Assessee.

4. The appeal by the Assessee was allowed by the CIT (A) by on order dated 31st January, 2001. The CIT (A) held that since the tax payable on the total income as

assessed was Nil, there was no positive income and therefore, the penalty could not be levied.

5. The appeal filed by the Revenue as well as cross-objections filed by the Assessee were heard together by the Tribunal. In its cross-objections, the Assessee had sought to support the order of the CIT (A) additionally on the ground that the Assessing Officer has not recorded his satisfaction in the assessment order that the penalty proceedings ought to be initiated against the Assessee.

6. The Tribunal, inter alia, relied on the decision of this Court in Commissioner of Income Tax v.Ram Commercial Enterprises Limited (2000) 246 ITR 568 and concluded that the Assessing Officer has not recorded a specific satisfaction before initiating the penalty proceedings against the Assessee. Accordingly, the entire penalty proceedings were set aside.

7. Ms. Sonia Mathur, learned junior standing counsel appearing for the Revenue submitted that the satisfaction of the Assessing Officer could be discerned from a plain reading of the assessment order. In response to a query whether in view of the decision of the Supreme Court in Virtual Soft Systems Limited v. Commissioner of Income Tax [2007] 289 ITR 83, absence of a positive income penalty could be levied. Ms. Mathur submitted that in the instant case the income for the assessment year in question, prior to the setting off the brought forward losses of the earlier years, was a positive income and therefore, penalty could be levied. Further, she sought to distinguish the judgment in Virtual Soft Systems Limited on the ground that in the said case the adjustment of unabsorbed depreciation of the previous years resulted in a negative income whereas in the present case the brought forward losses of earlier years was adjusted to result in a Nil income.

8. Appearing for the Assessee, Mr. Ajay Vohra, learned advocate drew our attention to the charging section which is Section 4 of the Act which reads as under:
"Section 4: Charge of Income Tax.
(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate of those rates shall be charged for that year in accordance with, and provisions (including provisions for the levy of additional income tax) of, this Act in respect of the total income of the previous year of every person.

Provided that where by virtue of any provision of this Act income tax is to be charged in respect of the income of a period other than the previous year, income tax shall be charged accordingly.

2. In respect of income chargeable under sub-section 91), income tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."

9. He further pointed out that expression "total income" in the above provision has been defined under Section 2 (45) of the Act is as under:
"Section 2(45) 'total income' means the total amount of income referred to in Section 5, computed in the manner laid down in this Act."

10. The computation of income under Section 5 included the entire gamut of deductions and additions including Section 72 of the Act which dealt with carry forward and set off business losses. He, accordingly, submitted that it is the assessed income as computed by the Assessing Officer in the assessment order which is relevant for the purposes of determining penalty under Section 271(1)(c) of the Act. The intention to evade payment of income tax would arise only when tax is otherwise payable. Referring to the observations of the Supreme Court in Virtual Soft Systems Limited he submitted that since the assessed income was Nil there was no question of any penalty. He further added that in the event that at any subsequent stage, by virtue of an appellate order, the income of the Assessee for the present assessment year was assessed as a positive income, then penalty proceedings might revive at that stage.

11. The amendment adding Explanation (4) to Section 271(1)(c) of the Act which permits the levy of penalty even where the income is not positive was made effective only from 1st April, 2003, that is from the assessment year 2003-04 onwards. This amendment came after the decision of the Supreme Court in Commissioner of Income Tax v. Prithipal Singh [2001] 249 ITR 670, affirming the decision of the Punjab & Haryana High Court that for levy of penalty there had to be a positive income. The position that existed in law earlier has been explained. The relevant observations of the Supreme Court in this regard reads as under (ITR,p.105):
"Applying Elphinstone case [1960] 40 ITR 142 (SC) to the present case, it can be held:

a. Total income" can only connote a positive figure and prior to the 2003 Amendment, Explanation 4(a) to Section 271(1)(c) required the computation to be done with reference to "total income".
b.The computation in the case of a loss making assesses, as in the present case cannot be made.

c. The words "in addition to any tax payable" can only be understood as the words "additional income-tax" were in Elphinstone case where this Court held that these words pre- suppose that tax was otherwise payable.
d. Conversely, even if the words "in addition to any tax payable" are considered superfluous and must be ignored when considering the case of a loss return, the computation cannot be made because here there is no total income, and because the computation cannot be made, the charge cannot be levied."

The Supreme Court went on to explain (ITR, p.106):

"Prior to the amendment made to Section 271 by the Finance Act, 2002, which came into operation on 1.4.2003, no penalty for concealment could be imposed unless some tax was payable by the assessee. In other words, if no tax was payable by the assessee, then the question of imposition of penalty of concealment did not arise at all. That position was changed for Page 0898 the first time only by the amendment made by the Finance Act, 2002 with effect from 1.4.2003. It is only by this amendment that the hitherto inseverable inter- connection between the liability to pay tax and the imposition of penalty was severed for the first time.

It may be noted that the amendment made to Section 271 by the Finance Act, 2002, only stated that amended provision would come into force with effect from April 1, 2003. The statute nowhere stated that the said amendment was either clarificatory or declaratory. On the contrary, the statute stated that the said amendment would come into effect on April 1, 2003, and therefore, would apply to only to future periods and not to any period prior to April 1, 2003, or to any assessment year prior to the assessment year 2003-04. It is the well-settled legal position that an amendment can be considered to be declaratory and clarificatory on if the statute itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory."

(emphasis supplied)

12. In view of the unambiguous declaration of the law by the Supreme Court, it is beyond doubt that no penalty can be levied under Section 271(1)(c) of the Act on the Assessee for the assessment year in question that is 1996-97 since there is no positive assessed income on which any tax is payable. We are unable to agree with the learned counsel for the Revenue that the decision of the Supreme Court in Virtual Soft Systems Limited is distinguishable in its application to the facts of the present case. Given the definition of "total income" and the requirement is that it is the assessed income, computed in the manner indicated in the Act, which is to be considered for the purposes of penalty, the penalty in the instant case cannot be

sustained for the simple reason that the assessed income is Nil. It matters little that the assessed income was Nil because of adjustment of brought forward losses or for any other reason.

14. For the above reasons, we do not find merit in this appeal . No substantial question of law arises. The appeals are dismissed.

Sd./-
S. MURALIDHAR, J

Sd./-
MADAN B. LOKUR, J

SEPTEMBER 17, 2007